Jak Kwang Builders & Developers Sdn Bhd v Pembinaan TJL (Sarawak) Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–255 OF 1999–III(I)
IAN CHIN J
11 JANUARY 2001

Arbitration *— Stay of proceedings — Application — Allegations of fraud, whether suitable for arbitration — Validity of notice of termination of contract and wrongful forfeiture of bond, whether arbitrator suitably qualified to make finding — Arbitration Act 1952 s 2*

Arbitration *— Step taken in proceedings — Satisfaction of criteria of s 6 of Arbiration Act 1952 — Whether entering of unconditional appearance constituted a step taken in proceedings — Arbitration Act 1952 s 6*

The defendant's application for a stay of all proceedings pursuant to s 2 of the Arbitration Act 1952 ('the Act') was allowed by the deputy registrar. The plaintiff appealed on the grounds, inter alia, that: (i) there were allegations of fraud thus the matters were not suitable for arbitration; (ii) the issue of whether the termination of the contract by the plaintiff was valid and whether the bond was wrongly forfeited were questions of law which were not suitable for arbitration; and (iii) the defendant had entered unconditional appearance and thus had taken a step in the proceedings within s 6 of the Act.

Held, dismissing the appeal:

(1) The allegations of fraud were only inserted after the defendant had applied for a stay. Obviously it was an attempt to forestall the stay application. Furthermore, the allegation of farud was fraud against a bank and not against the defendant and was not relevant to the issues which were sought to be litigated (see p 388F).

(2) The validity of the notice of termination was dependent upon what the facts really were as justifying the termination. That means it was principally a question of fact which an arbitrator would be suitably qualified to make such finding. Even in cases where the dispute is of a nature eminently suitable for trial in court, it is still not a sufficient ground for refusing to give effect to what the parties have by contract agreed (see p 388H–I).

(3) The intention of the defendant was very clear since they wanted and had in fact stated the appearance to be conditional and this intention was carried further when after entering appearance they applied to stay the action. Looking at the circumstances, the defendant could not be said to have entered or intended an unconditional appearance (see p 394F–G).

[Bahasa Malaysia summary

Permohonan defendan untuk penggantungan kesemua prosiding menurut s 2 Akta Timbangtara 1952 ('Akta tersebut') dibenarkan oleh timbalan pendaftar. Plaintif merayu berdasarkan alasan-alasan, antara lain, bahawa: (i) adanya tohmahan fraud dengan itu perkara tersebut tidak sesuai untuk timbangtara; (ii) isu mengenai sama ada penamatan kontrak oleh plaintif adalah sah dan sama ada bon telah dilucutkan dengan salahnya merupakan persoalan undang-undang yang tidak sesuai untuk timbangtara; dan (iii) defendan telah memasukkan kehadiran tanpa syarat dan justeru itu telah mengambil langkah dalam prosiding dalam lingkungan maksud s 6 Akta tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Tohmahan mengenai fraud hanya dimasukkan selepas defendan memohon penggantungan. Ia jelas merupakan satu percubaan untuk melengahkan permohonan penggantungan. Tambahan pula, tohmahan fraud merupakan fraud terhadap bank dan bukannya terhadap defendan dan tidak relevan kepada isu-isu yang sedang dilitigasikan (lihat ms 388F).

(2) Kesahihan notis penamatan tertakluk kepada apakah fakta-fakta sebenar yang menjustifikasikan penamatan tersebut. Ini bermakna pada asasnya ianya suatu soalan fakta yang mana seorang timbangtara layak membuat keputusan atasnya. Malahan dalam kes di mana pertikaian menonjolkan ciri-ciri yang amat sesuai untuk perbicaraan di mahkamah, ia bukanlah alasan yang mencukupi untuk enggan memberi kesan kepada apa yang telah disetujui melalui kontrak oleh pihak-pihak (lihat ms 388H–I).

(3) Tujuan defendan adalah amat nyata memandangkan mereka inginkan dan pada hakikatnya telah menyatakan kehadiran sebagai bersyarat dan hasrat ini diteruskan selanjutnya apabila selepas memasukkan kehadiran mereka memohon supaya tindakan tersebut digantung. Memandangkan keadaan ini, defendan tidak boleh dikatakan telah memasukkan atau menginginkan kehadiran tanpa syarat (lihat ms 394F–G).]

Notes

For cases on application for stay proceedings pending arbitration, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1014–1052.

Cases referred to

Alagappa Chettiar v Palanivelpillai & Ors [1967] 1 MLJ 208 (refd)

Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd [1990] 1 MLJ 305 (refd)

Co-operative Central Bank Ltd v Feyen Development Sdn Bhd (In receivership) [1997] 2 MLJ 829 (refd)

Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng [1996] 1 MLJ 178 (refd)
Dong Moon, The [1979] 1 MLJ 152 (refd)
Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)
Interscope Verischerung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529 (refd)
Phoenix Timber Co Ltd's Application, Re [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (refd)

Legislation referred to

Arbitration Act 1952 ss 2, 6, 25(1)
Arbitration Ordinance 1952
Rules of the High Court 1980 O 6 r 2, 6 r 4(3), 12 r 6, 12 r 6(2), 12 r 7(1), 13 r 8, 44 r 3(5)
Rules of the Supreme Court 1957
Sarawak, North Borneo and Brunei High Court (Civil Procedure) Rules
UK Arbitration Act 1950 ss 4(1), 4(2)

Chong Siew Chiang (*Chong Brothers Advocates Kuching*) for the plaintiff.
Stanley Eddy (*Battenberg & Talma Advocates Kuching*) for the defendant.

Introduction

Ian Chin J. : Jak Kwang Builders & Developers Sdn Bhd ('the plaintiff') appeals against the decision of the deputy registrar to stay all the proceedings of this action pursuant to s 2 of the Arbitration Act 1952, that was taken against Pembinaan TJL (Sarawak) Sdn Bhd. The decision of the deputy registrar can be summarised this way:

(1) that the disputes that had arisen between the parties are within the arbitration clause;

(2) that the defendant had entered into a conditional appearance and so intended even though the court had, for a technical reason already ruled, that appearance is to be unconditional;

(3) that the conduct of the defendant in proceeding with the arbitration despite the application for stay of this action was not conduct that disentitled them to obtain a stay of this action; and

(4) that the three conditions for a stay are all satisfied, that is the dispute is within the terms of the arbitration agreement, that the defendant had applied for a stay before taking a further step in this action and the defendant was ready and willing to proceed to arbitration.

There should be a further consideration, and that is whether there is sufficient reason why the matter should not be referred to arbitration

despite the agreement (*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97) and the plaintiff carries the burden of establishing such reason (*Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208). The deputy registrar had not referred to the contentions of the parties relating to this matter and it falls upon me to consider them.

Whether there are reasons why the matter should not proceed to arbitration

One of the contentions of Mr Chong Siew Chiang, learned counsel for the plaintiff, relates to the said fact that the defendant had moved the arbitrator to act even before the matter at hand had been decided. The deputy registrar was of the view that it had no bearing on the matter since the defendant was not prevented from doing so by any injunction. I cannot fault the deputy registrar for exercising his discretion, taking this factor into consideration. Neither can it be said that it was a pre-judgment of the pending application for a stay since what the defendant did was a right conferred by contract made between the parties, notwithmentioning the condition that the defendant must also show when applying for a stay that they are willing to submit to arbitration. As for the question of impartiality, it is a matter of changing the arbitrator if a case is made out, but it is not a reason for not submitting to arbitration and s 25(1) of the Arbitration Act 1952 talks of a named or designated arbitrator and has no relevance where the clause in this case provides, in the first instant, for the arbitrator to be agreed and failing which, the arbitrator is to be appointed by the president or vice present of an institution.

Mr Chong appears to be on firmer ground when he contended that since the plaintiff raised allegations of fraud, the matters are not suitable for arbitration, a contention the deputy registrar did not refer to at all.

> 11 At all material times after the building contract was entered into, the defendant failed to proceed with the works diligently and expediently. The defendant had breached the terms of the building contract as follows:
>
> (a) ...
>
> (b) ...
>
> (c) The defendant fraudulently induced and/or attempted to induce their bankers into releasing to them larger loan sums than their bankers would otherwise have done by presenting payment certificates purportedly issued by the architect on behalf of the plaintiff to the said bankers when the same had not been so issued, resulting in an investigation by the police into possible criminal conduct. The plaintiff further states that this is closely connected with the 'disputes' alleged by the defendant pursuant to the building contract. As a result of different progress claims submitted by the defendant, the plaintiff states that the progress claims made by the defendant to the plaintiff and the consultants are tainted with 'fraud' and the plaintiff believes that the defendant had made excessive and exaggerated progress claims.
>
> Particulars of fraud
>
> I Fabricating progress claims;

II Submitted different progress claims to their bankers and different progress claims to the plaintiff although pursuant to the same building contract;

III Relying on false documents to make claims wherein false 'progress claim' alleged by the defendant were made to resemble other 'bona fide' progress claims documents;

IV The different progress claims allege wholly different and inconsistent figures. For example, the false progress claim No 17 shows the value of work done to-date of RM20,837,354.00' as at 31 January 1999 whereas on or about 30 January 1999, the defendant had submitted the actual progress claims No 20 to the plaintiff and consultants showing a total work done of only RM16,211,105.41 as at 30 January 1999; and

V Payment certificates which are based upon the actual progress claims submitted by the defendant pursuant to the building contract and the defendant's allegation of claims of dissimilar nature would prevent proper certification of work by the consultants pursuant to the building contract.

(d)…(e)…(f)…(g)…(h).

The plaintiff then asserted that on those allegations the defendant 'had been negligent in the execution' of the contract works and had breached the contract, resulting in damages to the plaintiff. The consultant had proceeded to certify the delay and demanded completion after granting further time for compliance. When there was a failure to comply, the plaintiff terminated the contract and forfeited the bond money. Before that, the defendant had also terminated the contract when the plaintiff failed to pay in accordance with two interim certificates. The plaintiff claims various declarations relating to the terminations by the parties of the contract, that any claim by the defendant under the contract was premature until the figures and claims had been worked out under cl 25(3)(d) of the contract. None of the claims were based on fraud, and the allegation was only inserted after the defendant had applied for a stay. Obviously it was an attempt to forestall the stay application. Furthermore, the allegation of fraud is fraud against a bank and not against the plaintiff, and is not relevant to the issues which are sought to be litigated.

The plaintiff then contended that the issue of whether the termination of the contract by the plaintiff was valid and whether the bond was wrongly forfeited are questions of law which were not suitable for arbitration, citing *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20, which dealt with the validity of a partnership termination notice with which we are not concerned in this case. The validity of the notice of termination is dependent upon what the facts really were, as justifying the termination. That means it is principally a question of fact which an arbitrator, especially one that is involved in the building industry, as the one that is expected to be appointed in this case is, would be suitably qualified to make such findings. Even in cases where 'the dispute is of a nature eminently suitable for trial in court' it is still not a sufficient ground for refusing to give effect to what the parties have by contract agreed (*Re Phoenix Timber Co Ltd's Application* [1958] 2 QB 1; [1958] 1 All ER 815; [1958] 2 WLR 574.

As for the contention that the arbitrator should not be called upon to decide whether they have jurisdiction which, it is argued, against the maxim that a person should not be his own judge, of his own cause is without merit since the arbitrator would have no interest in the matter. This matter of jurisdiction of an arbitrator was one of the issues decided by the Court of Appeal in *Dato' Teong Teck Kim & Ors v Dato' Teong Teck Leng* [1996] 1 MLJ 178 where, at p 188, the court said this:

> As to the correctness of the action taken by the arbitrator in deciding the question of his own jurisdiction himself, the appellants' counsel referred us to *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Sir Michael J Mustill and Stewart C Boyd at p 290 (see 288 IAP):
>
> The arbitrator should take care, however, not to carry his enquiries into his jurisdiction too far. He should confine himself to the more obvious objections. Anything of a more recondite nature should be left for the parties to raise.
>
> If a question is raised on the jurisdiction of the arbitrator, either by a party or by the arbitrator himself, and if objection is pressed, the arbitrator should see whether the parties will themselves take steps to obtain a final ruling on the question of jurisdiction – by seeking declaratory relief, or by empowering him to decided the matter himself, or to state a case a upon it.
>
> If the parties remain inactive, the arbitrator can choose between these two procedures, ie either:
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> 1 to decide the question of jurisdiction himself, subsequently continuing or abandoning the arbitration according to what he decides; or
>
> 2 to set the question of jurisdiction on one side, leaving the parties to raise it in court, either before or after the award has been published.
>
> Which course the arbitrator should adopt will depend on the circumstances. If the objection is straightforward, he may consider it better to rule at once, always bearing in mind that if either party is dissatisfied, the matter can be reopened by the court. On the other hand, if the question of jurisdiction is difficult, or if the hearing on the merits is unlikely to be expensive, so that even a null award will not involve a great waste of costs, the arbitrator may think it better to proceed with the reference, warning the claimant that he goes ahead at his peril.

That case supports the proposition that even where the jurisdiction of the arbitrator is challenged, the arbitrator can still decide on the point or refer it to the court.

This leaves the last of the complaints, ie, that the appearance was unconditional and therefore the application must necessarily fail, citing *Interscope Verischerung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 CA, where it was held that the entry of an unconditional appearance constitutes the taking of a step in the proceedings within s 6 of the Act. The Court of Appeal there adopted as correct all that was said by Augustine Paul JC in *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691. According to the Court of Appeal, Augustine Paul JC was correct to say that all the previous decisions of the Malaysian Courts, which held that the entry of an unconditional appearance does not amount to 'a step in the proceedings' were wrong because they did so by relying on English cases without

appreciating the difference between s 6 of the Act and s 4(2) of the English Act.

Usahabina declined to follow several cases for the reason that they were all 'anchored on English law as indicated by the statement that no steps should be taken "after appearance"', referring to *The "Dong Moon"* [1979] 1 MLJ 152. Haidar JCA was a member of the panel of Court of Appeal and he did not say why he departed from his view in *Chuan Hup Agencies Pte Ltd v Global Minerals (Sarawak) Sdn Bhd* [1990] 1 MLJ 305, where he said: 'The wordings in s 6 of the Arbitration Act 1952 seem to be substantially the same as in s 4(1) of the UK Arbitration Act 1950.' The English section reads:

> 4 (1) If any party to an arbitration agreement, or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court or a judge thereof, if satisfied that there is sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

While the Malaysian s 6 reads:

> 6 If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The material difference between the two sections are the absence from the s 6 of the phrases which I have highlighted in the English s 4(1), viz: 'at any time after appearance, and before delivering any pleading'.

Surely, whether or not the entry of an unconditional appearance bars a person from applying for a stay of proceedings depends on the meaning of s 6 of the Act, and not on whether the past cases had wrongly relied on English cases or on the English Act.

It is a question of construction, that is, ascertaining the meaning of the relevant phrase 'taking any other steps in the proceedings and determining whether the filing of an unconditional appearance is such a step'. In this regard *Usahabina* did not go into the question of construction to determine what is the meaning of that phrase. Since *Usahabina* did not go through the

construction process, consequently the Court of Appeal also did not as it adopted wholesale the decision of *Usahabina* without more. *Usahabina* was decided purely on the ground that the previous cases that concluded that the entry of an unconditional appearance did not amount to taking a step in the proceeding was wrong because they had followed English cases which cannot be relied on because the English Act allowed an appearance by proscribing only acts coming 'after appearance'. It cannot be correct, as appears to be the position taken by *Usahabina*, that because those cases relied wrongly on the English cases and because the wordings of the two sections are different, that the Malaysian section must necessarily disallow the filing of any unconditional appearance. *Usahabina* has the effect of changing the RHC 1980 since that decision is on the basis that the RHC 1980 permits the entering of a conditional appearance for the purpose of an application for a stay of the legal action, when in fact the RHC 1980, as will be demonstrated later, does not so permit. The Malaysian s 6 has to be construed to determine whether the filing of an unconditional appearance is to be regarded as 'any other steps in the legal proceedings.'

The phrase calls firstly for an understanding as to what steps are involved in a legal proceeding. For the purpose of the present case we take the position of a writ. A defendant is brought into the picture after he has been served the writ. He must thereafter entered an appearance within the stipulated time. The appearance can be unconditional or, with the leave of the court, conditional. The entry of a conditional appearance is governed by O 12 r 6 of the RHC 1980 and the prescribed Form 16 limits the purpose of such appearance to preserving the right 'to set aside the writ (or service of the writ)'. By O 12 r 6(2), such appearance is to be treated as unconditional unless the court otherwise orders or unless the defendant within 14 days thereof applies to set aside the writ or its service. If one applies to set aside a writ or its service, it can be done without first entering an appearance. This is provided in O 12 r 7(1) which reads:

> 7 (1)A defendant to an action may at any time before entering an appearance therein…….apply to the Court for an order setting aside the writ or service of the writ……

The only other instances of steps being allowed to be taken by a defendant before he enters an appearance are (a) payment into court that is governed by the Exchange Control Act (O 6 r 2); (b) request for a solicitor to state in writing he has the authority to act (O 6 r 4(3)); (c) setting aside judgment in default of appearance (O 13 r 8) and (d) setting aside judgment after receiving notice of it (O 44 r 3(5)). In all other cases, until an appearance is duly entered, a defendant is not entitled to take any step in the action or proceedings. Therefore, since an application for a stay of proceedings is not any of those exceptions I have just mentioned, the defendant must enter an appearance before he can apply for the stay. So, the defendant under the RHC 1980 must take two steps in the proceedings. He must first enter an unconditional appearance and not a conditional appearance because the latter is only allowed for the purpose of setting aside a writ or its service. It is only after entering the unconditional appearance that the defendant can

apply, which would be another step in the legal proceedings, for a stay of the proceedings. When construing s 6, regard must be had to the said provisions of the RHC 1980, since it refers to the various steps of a legal proceeding. Similar rules concerning appearance can also be found in the Supreme Court Rules 1957 which applied in 1972 before the coming into force of the RHC 1980. But we have to look further back and at the situation in Sarawak, because the nation in 1972 adopted the Arbitration Ordinance 1952 of Sarawak ('the Ordinance') to apply throughout Malaysia.

The Ordinance was introduced into Sarawak when it was a crown colony. It is obvious that on the whole, the provisions in the Ordinance were borrowed from the English Arbitration Act 1950 with slight variations which need not detain our attention except for the differences in our s 6 and the English s 4(1) which I have already mentioned earlier. The very important question that comes to mind is this: why were the words 'at any time after appearance, and before delivering any pleadings', that appear in the English section, dropped from s 6 of the Ordinance 1952? Those words have to do with court procedure, and in 1952 the English courts have rules regarding the entry of appearance and the delivery of pleadings. But during the 1950s, Sarawak (and also Sabah) court rules did not have such procedure. The rules applicable were the Sarawak, North Borneo and Brunei High Court (Civil Procedure) Rules ('the Rules') which were to be applied to Sarawak, North Borneo (as Sabah was then known) and Brunei and made in 1951 of an Order in Council. Although the rules only came into force in Sarawak on 1 December 1953, it was already in existence in 1951 and came into force in Sabah in 1951. Sabah and Sarawak adopted similar arbitration ordinances with the Sabah one coming into force in 1951 two years earlier than the Sarawak one. Since the arbitration ordinances were being considered for implementation in the two states at the time as the Rules, it must be in the contemplation of the legislature what the Rules were or would be when reference was to be made to them in the Ordinance. An examination of the Rules will explain why those words were omitted from the Ordinance when it was introduced into Sabah and Sarawak, respectively in 1951 and 1953. Under the Rules one starts an action by taking out a writ of summons which is in this form:

FORM 1 Original

NO

IN THE HIGH COURT OF SARAWAK, NORTH BORNEO AND BRUNEI

WRIT OF SUMMONS

(Rule 4 of the Sarawak, North Borneo and Brunei High Court (Civil Procedure Rules.)

Action No……..,19…….

Between……Plaintiff

and……..Defendant

To……, of…….

You are hereby commanded in Her Majesty's name to attend this Court at……on……the…….day of……..19…..at…….o'clock in the *fore/after noon to answer an action against you by .....of ……
…The action has been set down for *mention/hearing.

The plaintiff's claim:……..……..
……
……
Issued at…….the……day of……19……
Fees $ cts.
Summons
Service

……..
Judge/Magistrate

Vide Receipt No……..of…….

Take notice—

1 If you fail to attend the hearing of the action or at any continuation or adjournment thereof, the Court may allow the plaintiff to proceed to judgment and execution.

2 If the action is set down for mention only, you should attend with your documents but you need not summon your witnesses if any.

3 If the action is set down for hearing, you should attend with your witnesses, if any, and also bring your documents with you.

That form just about sums up the whole procedure in the High Court in Sabah and Sarawak in the 1950s and thereafter until the introduction of the Rules of the Supreme Court 1957 after the formation of Malaysia. There is no requirement for the entry of appearance and the delivery of any pleadings, except that (1) if a defendant wants to make payment into court, such payment must be accompanied by a written defence and (2) if a defendant wants to counterclaim or set off he must lodge with the registrar and serve the plaintiff a notice containing the concise statement of the grounds of such counterclaim or set off. There is a general provision to apply English procedures if none is found in those rules.

Thus, it should be abundantly clear that the omission of those words from the Ordinance was to take into account the fact that there was then no such thing as 'the entry of appearance', nor 'the delivery of any pleadings'. It therefore cannot be said that it was because the legislature intended that a party should not enter an unconditional appearance if he wants a stay of the legal process that those words were omitted from the Ordinance.

If a defendant in Sabah or Sarawak wanted to apply for a stay in 1951 or 1953, he would first have to appear personally on the date fixed by the writ of summons or else judgment may be given against him. It is only after that appearance that a defendant can then apply for a stay of proceedings. But he must not take 'any other steps in the legal proceedings', which I would construe to include, for example, the filing of a notice of counterclaim, if he is not to be debarred from obtaining a stay under s 6 of

the Ordinance. Therefore, the word 'other' in the phrase 'any other steps in the legal proceedings' envisage more than one step which a defendant must have taken before he is debarred. Take the example just mentioned, he is allowed to appear in obedience to the writ of summons to avoid judgment before applying for a stay. That would be the first of the steps that he can take. But his next step must be to apply for the stay and not for anything else if he is not to be regarded to have taken 'any other steps'. That is the position in 1950. What, then, is the position in 1972 or today? It is the same save that the first step would not be the personal appearance since the present day writ does not require it. Instead, the present day rules require a formal appearance and the only appearance you are allowed under the RHC 1980 is an unconditional one except for cases under O 12 r 6, which is only for the purpose of setting aside a writ or its service and not for the purpose of staying an action.

Therefore, the defendant has to enter an unconditional appearance, the conditional appearance not being open to them, and this is the first step he is allowed to do under s 6(1) of the Arbitration Act, since the term 'any other step' would necessarily mean that there has to be at least one step. This must be followed by the application for a stay, and that would be the action before 'any other step'.

Therefore, it cannot be correct to say that s 6(1) requires a conditional appearance to be entered. Even less so when the words in s 6 do not expressly prohibit the entry of an unconditional appearance. For the reasons *Usahabina* cannot be correct. But what is the option opened to me when *Usahabina* has been upheld by the Court of Appeal, though it gives no reason. The path I have to take is clear; I have to obey the decision of the Court of Appeal, much as I think the decision is wrong (See *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd (In receivership)* [1997] 2 MLJ 829).

However, in this case, a conditional appearance was in fact entered but ruled unconditional by the court. But the intention of the defendant was very clear since they wanted and had in fact stated the appearance to be conditional and this intention was carried further when after entering appearance they applied to stay the action. Looking at the circumstances, I am of the view that the defendant cannot be said to have entered or intended an unconditional appearance.

Conclusion

All the conditions for a stay has been established, and there is no sufficient reason shown why the matter should not proceed to arbitration. For the reasons I have stated, the appeal is dismissed with costs to the defendant.

Appeal dismissed.

Reported by Jafisah Jaafar